UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PATRICIA HURST HOLT, Plaintiff, vs. J.L. PRESCOTT CO., a New Jersey corporation, Defendant.	Case No. 93 3050 WDK(Bx)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW
AND ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Excerpts of Record

Opinion of Judge William D. Keller

. . .

THE COURT: Okay. Thank you for your patience.

I have given a considerable amount of thought to your respective positions, and let me say this first of all: I'm quite confident that your respective positions are earnestly held, and of that I have no doubt.

It seems to me that we should identify, at this juncture, that Rule 52 of the Federal Rules of Civil Procedure require that the Court state on the record, in a bench trial, its findings of fact and conclusions of law which constitutes the basis of any decision. That's what I'm about now, and I'm doing it in open Court, as required by Rule 52.

There are a number of legal principles that the attorneys have called to my attention, which guide the Court in making its assessment. I would like to first talk in terms of Civil Code Section 1649, because that's where this all starts.

Mr. Sher argues that there isn't any ambiguity in this contract whatsoever, and there is a very strong argument that can be made that Mr. Sher is right; there isn't any ambiguity whatsoever. But I indicated to you yesterday, and I continue to believe that there is an arguable ambiguity in the contract. Most

particularly, the paragraph referring to the late Shirley Keilly.

The provision in question could have said, "Residual payments will go to my wife," or alternatively, "spouse," with no name. That would have been easy, and you wouldn't be here, I don't think, if that's the case. The contract could have said, "It goes to Shirley Keilly." That would have been easy, but not as easy as the first scenario, but easy. You might still be here in that situation.

The drafters of this contract, most particularly the drafter of this contract, Mr. Keilly, chose to say something to the effect -- if I can get it here right now -- "My wife, Shirley G. Keilly." Therein lies the nub of the problem in that he identified both his wife, and Shirley Keilly.

This, in my view, is the stuff of ambiguity, and therefore Mr. Sher's position is not a shared view of this Court. Instead, I believe that there was an ambiguity, and as such we turn to 1649 of the civil code. That directs the Court as to the manner in which it shall interpret a contract.

It says, "If the terms of a promise are in any" -- I stress the word -- "any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor -- as you repeatedly said to me, that's Prescott -- believed at the time of making it."

Now, let's not forget that at any time in this analysis, that's the focus. Can we use later activities to reflect upon the belief of the promisor at the time of making it? Certainly, you can, and that's what each side has done from time to time.

Going back, it must be interpreted in a sense in which the promisor believed, at the time of making it, that the promisee, Bud Keilly, understood it.

Now, we're going to use that as a starting point, but there are a couple of other sections in these interpretation of contract sections, as set forth in the California Civil Code, that are helpful, one of which is section 1636.

Section 1636 says, "A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting -- again, you find that wording, "as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Now then, in addition to 1636, another section that is of moment in the analytical calculus here is 1646. And that says, "A contract is to be interpreted according to the law and usage of the place where it has performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

Now, I'm interpreting that, in part, to mean the custom and practice within the industry; i.e., usage equals custom and practice.

In addition, you have section 1654, which says, "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." That's the Bud Keilly drafting analysis.

We have a mutuality argument that is advanced by Mr. Kenney. I don't believe that mutuality argument carries the day as regards how 1654 is to be used in this case. That's the overarching contract interpretation law that is to guide the Court.

Now, what I've done is I haven't sat down and organized this in such a way as I would for final argument. Quite frankly, I would have analyzed it chronologically, and I would be prepared to take all of us from the standpoint of who Bud Keilly was and what Bud Keilly could do, and how did Prescott company come into contract with Bud Keilly; namely, they wanted to sign up Super Valu and others.

Keilly was somebody who was somewhat sui generis to Prescott. As a matter of fact, that is the overview that I think I have here.

There seems to be no doubt you that Bud Keilly was indeed a very talented manufacturer's rep. One who commanded a very good living not only from Prescott, but seemingly from others, and for good reason. He was very effective, and he was somebody that they wanted to sign up.

Now, I'm getting a little bit ahead of myself, and I'm saying to you in my own defense that I haven't sat down here for a couple of hours and tried to draft an exact flow of things; okay? But if did, were I to flow this, that's the way I would flow it. I would set you a picture that would be pretty doggone compelling; all right?

Be that as it may, we are where we are, and I'm going to take this from the standpoint of the testimony that was adduced from each of the witnesses chronologically in this case, and make some observations regarding the testimony, and then proceed to make the findings that are necessary to a disposition of this case.

The first witness was plaintiff, and like all the witnesses in this case, I'm quite confident that she strongly believes in the position that she advanced in this lawsuit. I think there's a strongly-held position on both sides.

She testified in the matters that I have underlined, and, among other things, as to Carroll, in

his corporate capacity, at the meal at the Four Seasons restaurant in March of 1987 in New York City. She testified that Mr. Carroll assured Bud Keilly in her presence that everything was going to be okay, "Don't worry any longer," and words to the effect that he knew that Keilly wanted to take care of his wife. "Bud don't worry, it's okay."

Now, it's been a long time. That's over seven years ago, and memories fade. The plaintiff is quite adamant that this is what was said.

Now, it may well be that was what was said, but I have gleaned from the materials that have been given to me a feeling about Bud Keilly. And that feeling is that Bud Keilly, when it became appropriate, was not at all reluctant to assert what he perceived to be his contractual rights.

There are a number of documents in the evidence books here where Keilly's asking for various things that he thinks the company has promised, and they better be forthcoming in the near future. There is nothing in this record, insofar as I recall it, to the effect of, when he found himself at an impasse down the road with Prescott, Bud Keilly writing to the Prescott company and any of its corporate officers saying, "Hey, fellas. Remember that meal at the Four Seasons? You placated me by saying, 'Hey, don't worry about it. We'll take care of it you.'" There is nothing in the record to reflect that.

As I said, Bud is not the retiring type. Bud did not do that, if that's what transpired, so that it is very helpful to me in trying to figure out what's going on here.

Now, let me tell both sides that here I am, and I've worked with you on a motion or two in the past, and I've spent a few hours acquainting myself with the law and facts of this case. I'm not arrogating to myself or saying that I'm profound, all I'm trying to do is make the findings that I can make based on what's been presented to me.

What I'm telling you is that with the analytical tools that are available to me, this is the way this thing plays out; you would have seen something in here from Bud Keilly, and you've got nothing about the Four Seasons, or the meeting in Mr. Carroll's office.

Now, the plaintiff, Patricia Holt, testified that Carroll assured Keilly something to the effect that he would take care of the administerial details. And I have in brackets in my notes, "If so, why wasn't it done?" Was he trying to pacify Keilly?

Keilly is pretty important to him. As I understand it, Keilly is an important manufacturer's rep in the market, far away from Passaic, New Jersey, so what's going on here? If these are just administerial details, why don't we hear something?

Why wouldn't Keilly have sent a letter saying, "Why haven't I heard anything on the administerial details?

I mean this is not the stuff of a deal-breaker; okay? There is no reluctance on the part of Keilly to write here, and there is no reluctance in any of his letters that we have in the record; quite the contrary. He's not the reluctant type, and yet no letter saying, "How about complying with the administerial details?"

Now, Mr. Sher, asked some questions which were a precursor to the testimony of Mr. Carroll. Mr. Sher asked some questions that, frankly, to me, were rather bizarre. "Did you stay awake at this meeting that much? Did you fall into Mr. Marino's lap?" Quite obviously, if Mr. Sher is going to ask those questions, I mean you can anticipate that he's got some backup testimony, and that's just in fact what happened.

Now, what was the testimony that backed this up? That testimony was the testimony of Mr. Carroll. And Mr. Carroll struck me, as everybody else, as being very straightforward. What ax does he have to grind here?

As I understand it, the company that assumed the liabilities and assets of Prescott is known as DeSoto. There is uncontradicted testimony that DeSoto's gross sales, albeit sales per year, are $110

million; all right? I don't have any indication that they are in extremis like Prescott was, financially, at times during this lawsuit.

I don't minimize what's at issue here -- $171,000 is a significant amount of money -- but when you're doing $110 million a year, $171 -- doesn't mean to you what it means to me.

Mr. Carroll, as I've indicated, doesn't work for them anymore. And as my notes say, "no ax to grind." In red I put, "Not a big deal."

Now, what does he say about this case? It's interesting.

You know, there are many indices in evaluating testimony of witnesses. And sometimes somebody who can't remember things is very believable, because they are really being forthcoming, honest, straightforward. Sometimes there is a ring of truth to testimony based upon specific recollection.

Now, we have Mr. Carroll sitting about four or five feet from me, and he's telling me, you know, "I want to tell you something.

"I'm coming from New Jersey, and I'll tell you where I was going; I was going to New York City. And I'm telling you I didn't go in any limousine, I went in a cab. And I'm telling you very clearly it

wasn't dinner, it was lunch. And I'm telling you I was never in a limousine, albeit Mr. Keilly was in a limousine.

"I'm going to tell you I have a specific recollection of a number of things that happened here, and they include that we were about an hour and a quarter to an hour and a half late. And as luck would have it, the soon-to-be Keillys were in the restaurant, and they had had a few drinks."

Now, I'm not castigating the Keillys for having a few drinks; far from it. If I castigated myself and all of my friends who had a few drinks, I would be doing a lot of castigating; okay? So that isn't what I'm going here,; all right?

What I'm saying is that Mr. Carroll has what I would perceive to be a pretty clear recollection of this; namely, "I'm only meeting with the Keillys one time at the Four Seasons, and I know what Mrs. Keilly's" -- or whatever name she was using at that time, I'm not sure. I'm going to call her "Mrs. Keilly," and I'm referring to the plaintiff in this lawsuit -- "and I know what Mrs. Keilly's condition was.

"I'm telling you she had quite a few drinks, and she wasn't as attentive as you might expect a normal person to be. She was somewhat sleepy, and she did fall or lapse into Mr. Marino's lap briefly."

Now, contrast that with the testimony that was elicited from your client, Mr. Kenney. The testimony elicited from your client was, "Do you remember this?"

"I don't recall."

You know, if somebody tells me I fell in somebody's lap, I'm going to tell you I'm coming right down their throat if they tell me I fell in somebody's lap.

I had somebody in here a while back in a lawsuit that's talking about me being drunk in court. Drunk in court? I mean, you've got to be kidding; okay? And I made my reaction very clear.

I want to tell you something: Your client is positively -- and that means in a positive sense -- assertive. If somebody accused her of being basically inebriated, falling in somebody's lap, she's going to say, "I don't recall being sleepy"? I mean, right in your face, Mr. Shir, "I never was anything like that."

I didn't get that kind of testimony; okay? So I have clear, crisp testimony from Mr. Carroll, and I have I-don't-recall testimony from your client, who I don't perceive as a wallflower; okay?

Now, the next thing is we have Carroll testifying that Mr. Bud Keilly, at the time that he

met with them back in Passaic, at or about the time of the -- I believe it was a luncheon meeting.

Is that what you said, a luncheon meeting at the four Seasons?

We have Mr. Carroll testifying that he told Mr. Keilly to put it in writing, and, you know, "Bud, you're emotional, and I want you to put it in writing."

Now, a little bit of what Mr. Carroll said I'm looking at and thinking, "Hey, you are not giving me everything." Maybe I'm right, maybe I'm wrong, I don't know, but I will tell you this: In the main, if not all of his testimony, he seemed to be very straightforward.

As I said, what bias does he have to -- you know, think about this -- to stick the widow, or to stiff her, in street terms, $171,000? I mean look, he's got a hereafter to look to, too. "What am I going to do that for?"

Now, if he did it, then he's got to live with it, but that isn't my sense of things. There aren't too many people -- I mean there are many people who will say most anything. I mean, Lord knows, I see them parade through here, but I don't think Mr. Carroll is here to make up a story to deprive your

client of $171,000 or thereabouts. I mean that's low, real low, if that's what you are about; okay?

So what do we have that corroborates Mr. Carroll, besides my observation of Mr. Carroll? Well, I've indicated to you one set of things; namely what he testified to about the luncheon, and what she testified to about the luncheon. We also have corroboration in the fact that Mr. Keilly writes to Carroll proposing the contract. You think Carroll is imagining, "I told Keilly write me"?

Let's get on to some other things.

"Sure, it came up from time to time," says Carroll, "I'm not saying it didn't come up. Of course it came up, and he was concerned." But you know as well as I do, Mr. KENNEY, that somebody can't unilaterally change a contract, and I'm telling you something; that's what's going on here. The fact of the matter is Mr. Keilly writes this letter, and he does suggest the changes.

Now, a very, very interesting piece of evidence is the testimony of Mr. Carroll regarding the discussion of changes.

Keilly said he wanted to make changes from Shirley to the estate. If you look at Exhibit 17, you are going to find that Mr. Keilly wrote to Mr. Carroll on June 2, 1987, and in the attachment the printed

words are -- Mr. Keilly's selected words are, quote, "proposed changes."

Now, common understanding, Mr. KENNEY, of the word "changes" means, "We've got a deal, and I want to change it"; all right?

Now, I grant you that were I the plaintiff, I would say, "We're talking about a layperson here; okay? He's no attorney, and 'changes' doesn't mean that to him." But I think what carries the day is "changes."

Mr. Keilly denominates these as changes in his attachment, and he says, "In reference to paragraph six, we propose it reads as follows:

"If you should die during the term of this agreement, we will continue to pay the above defined commission to your estate."

He's not even talking about his new wife.

Let's see if she was a new wife as of that time.

They were married on 6/2 of '87, I think.

When were they married, Mr. --

MR. KENNEY: They were married on February 14th of '88.

THE COURT: Okay.

MR. KENNEY: This is before the marriage.

THE COURT: But this is after Shirley died on January 18, 1987, so he's writing to the company, Prescott, and proposing, "We will continue to pay the above defined commission to your estate, or whomever you designate, until December 31, 1993. Subsequent to that date we will pay your estate, or designee, a flat two percent on total sales until December 31, 2003."

So he wants to bump this another decade; that's a retiring salesman?

I want to tell you, you want to talk to somebody pushy and strong? And I don't say "pushy" in a nasty sense, I really don't. I mean this is not some retiring type that was afraid to take on Prescott; quite the contrary. He's lobbying for another 10 years. He's looking for something the uncontradicted testimony says is not the norm at all in the industry, a death benefit that does not normally exist. Instead, it's normally 30, 60 or 90 days, and you're out.

So what he's doing is he's looking for another 10 years. And, you know, in effect he's saying, "I want to change. Shirley isn't around anymore, and I

want to designate my estate. I want a death benefit," is what he's saying.

Now, the first question I'm thinking about is where are you, Carroll? Why don't you give this man the courtesy of responding, or alternatively, this man is a big thing on the West Coast, so why don't you, from a business standpoint, ask for him?

Well, Mr. Carroll does answer that. And he tells us that this LBO situation back there created -- well, he doesn't characterize it this way, but it was a truly frenetic situation in Passaic. This was one of -- I think he said the number, and I don't remember the number. It is in my notes and I can't find it now, but it was one of a dozen or more LBOs. They faced a dozen or more LBOs during this period of time, plus they had a case of financial problems.

Now, you want to use financial problems to show what they were doing, Mr. KENNEY, and what their state of mind was. And I'll tell you that I have no doubt that they had some financial problems later in the day, and that they were looking for ways to save money; there isn't any doubt about that. But that doesn't reflect upon the 1649 analysis; namely, what was the intention of the parties at the time they entered into the contract? That's what you are looking at.

Now, moving back to the testimony of Mr. Carroll, he's the president, or was the president -- I don't remember which, and it doesn't make any real difference -- of a trade association that basically deals with manufacturers' representatives in these unbranded brands.

What does he say? He says, "I've been around this industry for a long, long time. As a matter of fact, I was a president of the industry. In that capacity, I can tell you about death benefits in this industry, and it's a buyers' market from the standpoint of the manufacturer; namely, the people who are out there, by way of death benefits, they are getting 30, 60 and 90 days, and nothing more."

That is a precursor, Mr. KENNEY, to talking about what's going on here with this death benefit for Shirley Keilly, and why Shirley Keilly got the death benefit. That all sets the stage for Mr. Spellman, who comes on the scene.

Now, as regards Mr. Spellman, who, I'm told authoritatively by my reporter and by my law clerk I have continually and habitually called "Mr. Feldman" --

I apologize, Mr. Spellman. I hopefully will continue to call you "Spellman," but I'll move on with the analysis.

I have Mr. Spellman that testifies. Now again, Mr. Spellman does have a retirement program. He does have the many years with the organization, and of course, so does Mr. Carroll. But there isn't the kind of bias, "Well, by golly, I've got to maintain my job, and I better say the right thing here or I'm in real trouble."

Again, I've got to look at this thing from the standpoint of really, you know, Spellman, just as Mr. Carroll, he's got to recognize, "I'm doing a dead man out of what he is entitled to by my testimony if it's false. I'm doing that."

I mean that's serious stuff. I mean it's not to some people as it is to these people, so are you going to sit up there and do that? I mean, I've said it once, and I'll say it again; that's about as low as you can get.

Now, I did say that were I organizing this case from an argumentation standpoint as an attorney, I would be a little less jumbled, and I would get to this point where I am now initially, and that is what was the setting that presented itself.

You have the unrebutted testimony -- you know, I don't have anybody from Super Valu here. I don't have anybody who is a manufacturer's rep at or about the time in question who says, "There is no custom and practice as testified to by Spellman, or as

testified to by Mr. Carroll. Don't give me that stuff about no death benefits"; quite the contrary. The record speaks only to what is not custom and practice, and that testimony is adduced from two people who are steeped in the field of manufacturers' reps in unbranded products.

So what was going on here? Well, here you've got Mr. Spellman. He's the vice president of sales back in 1993, and he has some potential markets out here that are obviously substantial. And who is his contact? Who is he told about? He's told about Bud Keilly.

How important is it? Does he pick up the phone? Does he write a letter and try to close a deal with Keilly over the phone or via letter? No. He comes out to Los Angeles, Century City, and he meets with Mr. Keilly in Mr. Keilly's office. And as I recall it, Mr. Carroll was also present.

Now, at that point in time, from an analytical standpoint, Keilly was in the catbird seat, as the saying goes. He is the man with the leverage; they want Keilly.

Now does Keilly want them? Probably. At $12,000 a month, I could use him, too, in commissions. But the fact of the matter is that Keilly, we know, is in such a position that they,

Carroll, want Keilly. And as Mr. Spellman said, Keilly discussed what he would want to come on.

As I put in my notes on my yellow pad, Keilly had the bargaining power. And this lends credence to the fact that Keilly struck several deals that were not the norm. Keilly struck a two/four percent deal, or four/six percent deal. There isn't any four/six percent deals in the business.

You want to bring somebody in, Mr. Kenney, who says Mr. Carroll and Mr. Spellman are all wet? You can do it, but I don't have any testimony to that effect.

So again, the unrebutted testimony from two men who have spent a good part of their professional lives in the business, particularly in the case of Mr. Spellman, since 1966, is, "The norm is we do the dictating, not the manufacturer's rep. And I will tell you, in the dictation, you don't make deals that are as represented in Exhibit 2, which is the contract, and that deal is four percent and six percent. That is not the norm." That is unrebutted, and that is one evaluative index of what in the world is going on here.

In addition to the percentages that we're talking about, we have a 10-year contract.

Mind you, I'll tell you how strong Keilly thought he was; he was looking for another 10 years. And in addition to that, we've got an advance of $50,000. Unique, according to Mr. Spellman.

In addition, we have the testimony that Bud Keilly wanted Shirley Keilly protected, and defendant doesn't deny that; quite the contrary. The defendant says, in the case of Mr. Spellman, "We told them we don't go for that kind of deal. Again, we are leveraged because we need the guy."

What does he use as a closer? He uses as a closer -- and the testimony is unrebutted -- "She is an integral part of my business. She has the social contacts, and she gets along famously with Gene Hoffman, the president of Super Valu."

Now, let me take a step back for just a second.

You had Mr. Quinn up here this morning. I don't doubt Mr. Quinn, and I'm sure Mr. Quinn is telling the truth. But Mr. Quinn wasn't there when Keilly bargained for this contract. Mr. Quinn doesn't know what the social relationship was, or at least he didn't testify to the relationship between Keilly's wife, Shirley, and the people at Super Value. He didn't address that, Mr. Quinn, in his testimony.

And I'm going to receive the testimony over the hearsay objection, even though I think it's clearly hearsay; okay? But I think it's of no moment.

It's a nonappellate issue, and I'm considering it. I'm addressing it, I'm evaluating it, and I'm saying it is of no moment, because it doesn't get to the heart of the dispute.

The heart of the dispute is what was Mr. Keilly using as a bargaining tool to bring aboard coverage for Shirley? That tool was, "Hey, there is another dimension to this, and I'm going to tell you what that dimension is, Mr. Spellman or Mr. Carroll," and they were sold on that basis.

Now, when you take this analysis, and you ask what the position of the parties was -- the 1649 analysis at the time they entered into the contract -- frankly, I don't even think it's close. And I'll tell you something else, on this drafter analysis, were I to implicate that -- and the drafter analysis is referred to in 1654 -- Keilly drafted that particular paragraph, they didn't. Prescott didn't draft that.

Where you can parse various aspects of a contract, and directly attribute something to an individual, you have to interpret against the person who drafted it. And I'm saying to you, if you compare Exhibits 1 and 2 -- Exhibit 1 being the original suggestion by Mr. Keilly, and Exhibit 2 being

the final contract -- you are going to see there are no changes of moment between Exhibit 1 and Exhibit 2, most particularly regarding the contractual provision at issue.

Therefore, 1654 alternatively comes into play, and you interpret it against Mr. Keilly. If there is still an ambiguity, he loses, but I don't think there is any ambiguity to begin with, if you ever get to, under 1654, a continuing uncertainty.

In other words, "I've gone through all this and I still say, 'What's going on here?'" I'm not saying that. I'm telling you that the promisor at the time the contract was entered into was clearly contemplating, as was the decedent, coverage for a specific person, Shirley Keilly. For all the reasons identified, that's my legal conclusion.

If you get beyond that and you say, "Well, Judge, you're wrong," then I'm saying to you, alternatively, that I'll give you another legal conclusion. And that is if there remained an uncertainty, despite the numerous indices that I indicated of contractual intent, if you get beyond that and say there is still an uncertainty, then you are in the realm of 1654, and you get into the analysis I just gave you, and I think your client still loses, Mr. KENNEY.

I've got to tell you, in conclusion, that each of you very clearly believed in your view, and I can understand how your client, Mr. KENNEY, and you believe in what you are saying. But you have to understand that I'm sitting here as a receptor, and I've got to work with what I have here, and I've tried to evaluate it for you, although it's unpleasant,

Quite frankly, you know, the easy thing is to give to the individual and stick the company. I mean that obviously is not the law, although that goes on in some corners, let's just put it that way. That's not the law, and I don't think the facts warranted recovery by you and your client, therefore I enter judgment in favor of the defendant.

Don't forget to call your witnesses, and thank you very much.

MR. KENNEY: Thank you, your Honor.

MR. SHER: Thank you, your Honor.

(The proceedings adjourned at 12:25 p.m.)